



## **ENVIRONMENTAL PROTECTION AGENCY**

**[EPA-HQ-OW-2013-0710; FRL-9956-48-Region 5]**

### **State Program Requirements; Approval of Program Revisions to Michigan's Clean Water Act Section 404 Program**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of decision.

**SUMMARY:** In a July 5, 2013, letter, the Michigan Department of Environmental Quality (MDEQ) requested that the Environmental Protection Agency(EPA) approve revisions to the State's Clean Water Act (CWA) Section 404 permitting program that resulted from the enactment of Michigan Public Act 98 (PA 98). CWA Section 404 requires permits for dredge and fill activities in wetlands subject to federal jurisdiction. A state CWA Section 404 program must be conducted in accordance with the requirements of CWA Section 404 and its implementing regulations. Any revisions to state CWA programs must be approved by EPA before the revision may be implemented. Substantial modifications to a state's CWA Section 404 program become effective upon EPA approval and publication of EPA's decision in the Federal Register.

EPA has reviewed the proposed revisions to Michigan's Section 404 program within the sections of the Michigan statute modified by PA 98 and has found a majority of revisions within PA 98 sections to be consistent with the CWA and approvable. Other revisions are inconsistent with the CWA and thus not approvable.

**DATES:** Pursuant to 40 CFR 233.16(d)(4), the following revisions to Michigan's CWA Section 404 program are approved and in effect upon publication of this notice.

**FOR FURTHER INFORMATION CONTACT: Melanie Burdick, Watersheds and Wetlands Branch (WW-16j), U.S. Environmental Protection Agency, Region 5, 77 W.**

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**SUPPLEMENTARY INFORMATION:**

**I. General Information**

*A. Does this Action Apply to Me?*

This action applies to the MDEQ's CWA Section 404 program. Approval of these provisions affects those seeking CWA Section 404 dredge and fill permits from the State of Michigan.

*B. How Can I Get Copies Of This Decision and Other Related Information? Docket.*

EPA has established a docket for this action under Docket ID No. **EPA-HQ-OW-2013-0710**; **[FRL 9956-48-REGION 5]**. All publicly available materials related to this action are available either electronically through [www.regulations.gov](http://www.regulations.gov) or in hard copy at the Water Docket in the EPA Docket Center, (EPA/DC) EPA West, Room 3334, 1301 Constitution Ave., NW, Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744. You may access this Federal Register document electronically from the Government Printing Office under the "Federal Register" listings at FDSys <http://www.gpo.gov/fdsys/>. Insert: **EPA-HQ-OW-2013-0710**; **FRL 9956-48-Region 5** in the search field.

**II. Background and Scope of MDEQ Program Revisions**

Under Section 404 of the CWA, permits are required for activities involving discharges of dredged or fill material to waters of the United States, including wetlands, lakes and streams.

Michigan assumed CWA Section 404 permitting authority for its inland waters and wetlands in 1984. A state-assumed CWA Section 404 program must be conducted in accordance with the requirements of the CWA and its implementing regulations at 40 CFR part 233 (33 U.S.C. 1344(h), 40 CFR 233.1). In February 1997, EPA received a request from the Michigan Environmental Council to either ensure that the administration of Michigan's Section 404 program was consistent with the CWA, or withdraw Michigan's authority to administer the Section 404 program. In response to the request, EPA initiated an informal review of Michigan's administration of the Section 404 program. This Program Review was completed in April 2008. The 2008 Program Review identified several deficiencies in Michigan's Section 404 program. In response to the 2008 Program Review findings, MDEQ proposed a list of corrective actions to address those deficiencies. These corrective actions included making changes to the State's statutes governing state administration of the Section 404 program. On July 2, 2013, Michigan enacted PA 98 which contained significant amendments to Parts 301 (Inland Lakes and Streams) and 303 (Wetlands Protection) of Michigan's Natural Resources and Environmental Protection Act. The statutory amendments included changes intended to address the legislative corrective actions identified in EPA's 2008 Program Review; changes to the definition of contiguous wetlands regulated by Michigan's Section 404 program; the addition of new exemptions from permitting; and changes to the requirements for mitigating the effects of filling wetlands and other waters of the United States. The program revisions resulting from enactment of PA 98 are described EPA's *Supporting document for EPA decision to approve/deny Michigan's section 404 program statute changes in Public Act 98* which can be found in the docket for this action which is available electronically through [www.regulations.gov](http://www.regulations.gov), Docket ID No. EPA-HQ-OW-2013-0710.

On July 5, 2013, the MDEQ submitted PA 98 to EPA as a proposed revision to its CWA Section 404 program and requested EPA approval of the revisions. Per the regulations at 40 CFR 233.16(d)(3), EPA held a public hearing on December 11, 2013, sought public comment, and consulted with the Corps of Engineers and the U.S. Fish and Wildlife Service on the program revisions contained in PA 98. (Note: the U.S. National Marine Fisheries Service did not respond to EPA's request to consult.) The EPA also consulted with interested tribes per Executive Order 13175 and EPA policy.

In a letter to the MDEQ dated November 24, 2014, EPA requested clarification on the State's interpretation of a number of provisions within PA 98. The Michigan Department of the Attorney General responded to this request for clarification in a letter dated May 27, 2015. A copy of these letters can be found in the docket at: [www.regulations.gov](http://www.regulations.gov), Docket ID No. EPA-HQ-OW-2013-0710.

EPA has reviewed the proposed revisions within the sections of the Michigan statutes modified by PA 98, and has found a majority of the revisions to be fully consistent with the CWA and are approved. Other revisions are inconsistent and thus not approved.

### **III. Summary of Public Comments**

The EPA solicited and received public comment on the proposed revisions to Michigan's Section 404 program resulting from PA 98 via testimony at a December 11, 2013, public hearing, electronically through [www.regulations.gov](http://www.regulations.gov), and by written submissions to the docket for this action. Through these efforts, EPA received a total of 286 comments. Of the 134 unique comments received: 82 expressed support of EPA approval of the proposed program revisions resulting from PA 98, 49 opposed EPA approval, and the remaining commenters did not express support for approval or disapproval of the revisions. The majority of commenters simply

indicated whether they supported or did not support EPA approval of the program revisions in PA 98. While some commenters provided detailed rationale for their viewpoint, many did not. Most comments that supported approval of the program revisions in PA 98 also identified support for economic development in Michigan. Comments supporting approval of the revisions were from a diverse group of interests including agriculture, oil and gas, drain commissions, land development, home building, and manufacturing. Those commenters who expressed opposition to approval of the program revisions highlighted concern for environmental protection of rivers, lakes, and wetlands. These commenters felt that PA 98 did not adequately address the inconsistencies between Michigan's program and the CWA identified in EPA's 2008 Program Review and that additional provisions in PA 98 were inconsistent with the CWA requirements. Regardless of positions taken on EPA's approval of the proposed program revisions, most commenters supported Michigan's retention of the CWA Section 404 permitting program. Consistent with Executive Order 13175 and EPA's policy on *Consultation and Coordination with Indian Tribes* (<http://www.epa.gov/tribal/consultation/consult-policy.htm>), EPA held government-to-government consultation teleconferences with four interested Michigan tribal organizations on January 23, 2014. EPA received written comments from two tribes. All public comments received, EPA's *Summary of Public Comments and Responsiveness Summary* and a summary of EPA's consultation with tribes can be found in the docket at: [www.regulations.gov](http://www.regulations.gov), Docket ID No. EPA-HQ-OW-2013-0710; [FRL 9956-48-REGION 5].

#### **IV. Notice of Decision**

Pursuant to 40 CFR 233.16(d)(4), EPA has reviewed the proposed revisions to Michigan's Section 404 program resulting from enactment of PA 98 for consistency with the CWA and its implementing regulations. Where EPA has determined that the proposed revisions meet the

minimum requirements of the CWA and implementing regulations, EPA has approved the revisions which are in effect upon publication of this notice. EPA has disapproved those revisions that do not meet these minimum requirements.

EPA's review of the proposed revisions to Michigan's Section 404 program resulting from PA 98 does not constitute a comprehensive review of the State's program for conformance with the CWA, but rather addresses only proposed changes to Michigan's program related to PA 98 ensuring their consistency with CWA Section 404 and its implementing federal regulations.

Information about the proposed revisions to Michigan's Section 404 program pursuant to PA 98, the public hearing, EPA's response to comments and other supporting documents are available at: [www.regulations.gov/](http://www.regulations.gov/) (insert: EPA-HQ-OW-2013-0710 in the search field).

I hereby provide public notice that EPA has taken final action on the proposed revisions to MDEQ's CWA Section 404 program as outlined in Tables 1-2 below.

**Table 1: Provisions of PA 98 Consistent with requirements of CWA Section 404**

<b>PA 98 Provision - with descriptor</b>	<b>Decision</b>
Sec. 1307 Permit Processing Timeframes	Approved
Sec. 30101a. Statement of Purpose	Approved
Sec. 30103(1)(d)(i) and (ii) Exemption for Maintenance of Agricultural Drains	Approved
Sec. 30103(1)(e) Modification of Waste Treatment Exemption	Approved
Sec. 30103(1)(f) Modification of Minor Drainage Exemption	Approved
Sec. 30103(1)(g)(i)-(vi) and (viii) Modification of Drain Maintenance Exemption	Approved
Sec. 30103(3) Definition of Agricultural Drain Added	Approved
Sec. 30104 Changes in Michigan's Fee Requirements	Approved
Sec. 30105(3) and (5) Modification of Public Notice Provisions	Approved
Sec. 30105(8)(b) Modification of Maintenance and Repair of Existing Pipelines Provision	Approved
Sec. 30105(9) Modification of Section Authorizing Conditions for a Minor Project Category or General Permit	Approved
Sec. 30105(11) General Permit for Drain Activities	Approved
Sec. 30305(2)(d) Modification of Exemption for Grazing	Approved
Sec. 30305(2)(e) Modification of Exemption for Farming, Horticulture, Agriculture, Silviculture, Lumbering and Ranching	Approved
Sec. 30305(2)(h) Modification of Agricultural Drain Maintenance Exemption	Approved
Sec. 30305(2)(i) Exemption for Drain Maintenance	Approved: EPA recommends the

	language is clarified.
Sec. 30305(2)(j) Modification of Road Maintenance Exemption	Approved
Sec. 30305(2)(j) Deletion of Farm Production and Harvesting Exemption	Approved
Sec. 30305(2)(k) Modification of Maintenance of Public Streets Exemption	Approved
Sec. 30305(2)(l) Modification of Utility Line Maintenance Exemption	Approved: with the condition that the 2011 MOA will be revised.
Sec. 30305(2)(o) Deletion of Construction of Tailings Basin Exemption	Approved
Sec. 30305(4)(a) Modification of Wetlands Incidentally Created as Part of Sand, Gravel or Mineral Mining Exemption	Approved
Sec. 30305(8) Definition of Agricultural Drain	Approved
Sec. 30306(1)-(6) Modification of Application Requirements and Fees	Approved
Sec. 30306(7) Modification of Conditional Permits Under Emergency Conditions	Approved
Sec. 30306b Modification of Application Fees and Other Requirements	Approved
Sec. 30311(5)-(6) Consideration of Feasible and Prudent Alternatives	Approved
Sec. 30311a Deletion of Former Sections 30311a(2)-(5) on Consideration of Feasible and Prudent Alternatives	Approved
Sec. 30311d(5) Compensatory Mitigation Ratios	Approved
Sec. 30311d(6) Conservation Mitigation Credits for Easements for Impacted Agricultural Sites	Approved: the provision for a "stewardship fund"
Sec. 30311d(7) Stewardship Fund	Approved
Sec. 30311d(8)(a)-(e) Compensatory Mitigation Rulemaking	Approved
Sec. 30311d(9)(a),(b), and (c) Rulemaking to Encourage Banks	Approved
Sec. 30311d(10) Mitigation Bank Funding Program	Approved
Sec. 30312(5) General Permit Authority	Approved
Sec. 30312(6) General Permit for Blueberry Farming	Approved
Sec. 30312(7) General Permit for Blueberry Farming	Approved
Sec. 30321(7) Defines Drains, Ditches, etc. as Not being Wetlands	Approved: the second sentence "A temporary obstruction of drainage... identified as a wetland pursuant to section 30301(2)."
Sec. 30328 State Program Limited to Navigable Waters and Waters of the U.S.	Approved

**Table 2: Provisions of PA 98 Inconsistent with requirements of CWA Section 404**

<b>PA 98 Provision - with descriptor</b>	<b>Decision</b>
Sec. 30103(1)(g)(vii) Modification of Drain Maintenance Exemption	Disapproved
Sec. 30103(1)(m) Exemption for Controlled Livestock Access	Disapproved
Sec. 30305(2)(m) Modification of Utility Line Installation Exemption	Disapproved
Sec. 30305(2)(o) Exemption for Placement of Biological Residues in Wetlands	Disapproved
Sec. 30305(4)(b) Modification of Exemption for Wetlands Created as a result of Construction or Operation of a Waste Treatment Pond or Storm Water Facility	Disapproved
Sec. 30305(4)(d) Modification of Exemption for Wetlands Created as a Result of Construction of Drains to Remove Excess Soil Moisture from Upland Areas Primarily Used for Agriculture	Disapproved
Sec. 30305(4)(e) Exemption for Wetlands Formed in Roadside Ditches	Disapproved
Sec. 30305(4)(f) Exemption for Wetlands Created as a Result of Agricultural Soil and Water Conservation Practices	Disapproved
Sec. 30305(5) Contiguous Waters as a Result of Excavation	Disapproved
Sec. 30311(7) Consideration of Feasible and Prudent Alternatives	Disapproved
Sec. 30311d(6) Conservation Mitigation Credits for Easements for Impacted Agricultural Sites	Disapproved the statement: "protection and restoration of the impacted site "
Sec. 30321(5) Definition of "Not Contiguous"	Disapproved
Sec. 30321(6) Use of Drains to Establish Jurisdiction	Disapproved
Sec. 30321(7) Defines Drains, Ditches, etc. as Not Being Wetlands	Disapproved: the first sentence "A drainage structure such as a culvert, ditch, or channel, in and of itself, is not a wetland."

**Authority:** This action is taken under the authority of Section 404 of the Clean Water Act as amended, 42 U.S.C. 1344.

Dated: December 2, 2016.

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Robert A. Kaplan

Acting Regional Administrator

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